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Attorneys for Plaintiffs and Counterclaim Defendants
Tetris Holding, LLC and The Tetris Company, LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

TETRIS HOLDING, LLC and THE TETRIS
COMPANY, LLC,

Plaintiffs and
Counterclaim
Defendants,

- against -

XIO INTERACTIVE INC.,

Defendant and
Counterclaim Plaintiff.

Case No. 3:09-cv-6115 (FLW)
(DEA)

Hon. Freda L. Wolfson, U.S.D.J.
Hon. Douglas E. Arpert, U.S.M.J.

**SUPPLEMENTAL DECLARATION
OF JOHANNA SCHMITT, ESQ. IN
FURTHER SUPPORT OF
PLAINTIFFS' RULE 37(A) MOTION
TO COMPEL AND FOR COSTS**

Document Filed Electronically

I, Johanna Schmitt, Esq., hereby declare as follows:

1. I am a partner of the law firm of Kirkland & Ellis LLP, counsel to plaintiffs and counterclaim-defendants Tetris Holding, LLC and The Tetris Company, LLC (collectively “TTC”) in this action. I am an attorney admitted to practice in the state of New York and have been admitted *pro hac vice* to practice before this Court. I submit this supplemental declaration in further support of TTC’s motion pursuant to Federal Rule of Civil Procedure 37(a) to compel and for costs. This declaration is based on my personal knowledge and my knowledge based on my review of the documents produced in this case and the testimony provided during depositions.

2. Xio received no opinion letter from counsel advising it that *Mino* would not infringe. *See* M. Carter 30(b)(6) Dep. (Jan. 31, 2011) 184:25-185:4), a true and correct copy of which is attached to this Declaration as Exhibit A.

3. According to the game description page on Apple’s iTunes App Store, *Mino* was released on May 9, 2009. *See* XIO-DG-0008939, a true and correct copy of which is attached to this Declaration as Exhibit B.

4. Counsel for the parties have conferred about the issue of Xio’s reckless conduct with regard to protecting its privileged documents since October

2010, and TTC has expressly reserved its right to assert that privilege was waived on this basis.

5. Xio has tried to excuse its noncompliance with discovery obligations on the basis that it has few resources. *See* Letter from TTC to Judge Alpert dated October 28, 2010, a true and correct copy of which is attached to this Declaration as Exhibit **C**.

6. Xio's shareholders have invested tens of thousands of dollars in Xio. *See* XIO-0000131_00001, a true and correct copy of which is attached to this Declaration as Exhibit **D**.

7. Unlike TTC, Xio's attorney fees are capped at a small percentage of its revenues. *See* XIO-HD-DG-0013159, a true and correct copy (with redactions) of which is attached to this Declaration as Exhibit **E**.

Executed this 11th day of May 2011 at New York, New York.

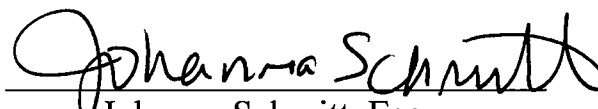

Johanna Schmitt, Esq.

EXHIBIT A

In The Matter Of:

TETRIS HOLDING, LLC

v.

XIO INTERACTIVE INC.

MICHAEL CARTER - 30(b)6

January 31, 2011

MERRILL CORPORATION

LegalLink, Inc.

135 Main Street
4th Floor
San Francisco, CA 94105
Phone: 415.357.4300
Fax: 415.357.4301

<p style="text-align: center;">181</p> <p>04:30:29 1 texture which we would then load up and display on the</p> <p>04:30:32 2 iPhone when the game started.</p> <p>04:30:33 3 Q. And that's all what you think copyright</p> <p>04:30:35 4 applies to of my client's works; is that right?</p> <p>04:30:38 5 MS. MAITRA: Objection; mischaracterizes</p> <p>04:30:40 6 testimony.</p> <p>04:30:40 7 THE WITNESS: So I'm speaking, I think, to --</p> <p>04:30:46 8 MS. CENDALI: Q. I'm trying to understand</p> <p>04:30:47 9 when you wrote, "The small bit of copyright law that</p> <p>04:30:50 10 does apply is solely to protect the graphical features</p> <p>04:30:54 11 used on individual elements in Mino." So what were you</p> <p>04:30:57 12 thinking was protected by copyright?</p> <p>04:30:58 13 A. So --</p> <p>04:31:00 14 MS. MAITRA: Objection; asked and answered.</p> <p>04:31:01 15 THE WITNESS: My understanding of what was</p> <p>04:31:03 16 protected by copyright included the graphical textures.</p> <p>04:31:09 17 That is to say, when Xio Interactive produced a</p> <p>04:31:15 18 graphical texture, that that exact sequence was our</p> <p>04:31:20 19 sequence that we built, and we owned, and it was</p> <p>04:31:24 20 different than the graphical sequence that the Tetris</p> <p>04:31:27 21 Company built for their game, and the two were</p> <p>04:31:31 22 discernibly different.</p> <p>04:31:32 23 And so copyright law applied to that where we</p> <p>04:31:36 24 couldn't take an exact copy of the texture files and we</p> <p>04:31:40 25 couldn't copy them onto a disk and then put them into</p>	<p style="text-align: center;">183</p> <p>04:32:56 1 MS. MAITRA: Objection; incomplete</p> <p>04:32:57 2 hypothetical.</p> <p>04:32:58 3 THE WITNESS: You know, I --</p> <p>04:33:01 4 MS. MAITRA: And, sorry, and calls for a legal</p> <p>04:33:03 5 conclusion.</p> <p>04:33:03 6 THE WITNESS: So I don't know what the</p> <p>04:33:08 7 legalities of that would be. I'm not a lawyer, and it's</p> <p>04:33:13 8 also really hard for me to speak to hypotheticals where</p> <p>04:33:16 9 there is no example put in front of me.</p> <p>04:33:19 10 I think that this is the sort of thing that's</p> <p>04:33:21 11 very complex, and that lawyers and judges spend a long</p> <p>04:33:27 12 time with examples in front of them to determine, and</p> <p>04:33:29 13 it's a very fine line, and I don't think I can answer</p> <p>04:33:32 14 your question with this hypothetical imagining of what</p> <p>04:33:34 15 you're saying because I don't really know what you mean</p> <p>04:33:37 16 without seeing an example. So if you want to put an</p> <p>04:33:40 17 example in front of me, you know, I can talk to my</p> <p>04:33:43 18 understanding of copyright law given that I'm not a</p> <p>04:33:47 19 lawyer and as it applies to that example.</p> <p>04:33:50 20 MS. CENDALI: Q. So, basically, Xio's</p> <p>04:33:51 21 position is that you know enough about copyright law to</p> <p>04:33:56 22 try to justify that you're not intentional infringers,</p> <p>04:33:59 23 but not so much about copyright law that you can answer</p> <p>04:34:03 24 a question; is that right?</p> <p>04:34:04 25 MS. MAITRA: Objection; mischaracterizes</p>
<p style="text-align: center;">182</p> <p>04:31:42 1 our game, that we had to build our own unique graphical</p> <p>04:31:45 2 textures, and that's what we did.</p> <p>04:31:49 3 MS. CENDALI: Q. Okay. Suppose the Walt</p> <p>04:31:49 4 Disney Company made a video game featuring Mickey Mouse.</p> <p>04:31:54 5 Do you believe that you could take that image of Mickey</p> <p>04:31:57 6 Mouse and change the texture of Mickey Mouse's pants,</p> <p>04:32:02 7 and that that would not be copyright infringement?</p> <p>04:32:06 8 MS. MAITRA: Objection; incomplete</p> <p>04:32:08 9 hypothetical; and mischaracterizes testimony.</p> <p>04:32:14 10 THE WITNESS: So it's really hard for me to</p> <p>04:32:17 11 speak to these sorts of descriptions without having some</p> <p>04:32:21 12 example in front of me. You know, I don't know what</p> <p>04:32:23 13 exactly the extent of the change you're talking about</p> <p>04:32:31 14 is.</p> <p>04:32:31 15 MS. CENDALI: Q. You never heard of Mickey</p> <p>04:32:32 16 Mouse?</p> <p>04:32:32 17 MS. MAITRA: Objection; mischaracterizes</p> <p>04:32:33 18 testimony.</p> <p>04:32:33 19 THE WITNESS: So that's not true. I have</p> <p>04:32:34 20 heard of Mickey Mouse.</p> <p>04:32:36 21 MS. CENDALI: Q. Okay. Mickey Mouse, same</p> <p>04:32:40 22 image, different graphical textures, do you believe that</p> <p>04:32:43 23 Mino could reproduce an image of Mickey Mouse with its</p> <p>04:32:48 24 own graphical image files without infringing on the Walt</p> <p>04:32:53 25 Disney Company's copyrights?</p>	<p style="text-align: center;">184</p> <p>04:34:07 1 testimony; and calls for a legal conclusion.</p> <p>04:34:11 2 MS. CENDALI: Q. That's true, isn't it?</p> <p>04:34:13 3 MS. MAITRA: Same objections.</p> <p>04:34:14 4 THE WITNESS: I don't think that's what I</p> <p>04:34:15 5 said. I think what I said was that copyright law is a</p> <p>04:34:20 6 complex thing.</p> <p>04:34:21 7 MS. CENDALI: Q. Right. And is it something</p> <p>04:34:24 8 that a lawyer should study?</p> <p>04:34:25 9 MS. MAITRA: Objection; vague.</p> <p>04:34:28 10 THE WITNESS: I don't know. I think some</p> <p>04:34:31 11 lawyers should study it.</p> <p>04:34:36 12 MS. CENDALI: Q. You believed, prior to</p> <p>04:34:37 13 releasing Mino, that copyright was a complex field of</p> <p>04:34:41 14 law; isn't that true?</p> <p>04:34:44 15 A. I probably believed that.</p> <p>04:34:46 16 Q. And you knew you weren't a lawyer, right?</p> <p>04:34:50 17 A. I knew that I wasn't a lawyer.</p> <p>04:34:52 18 Q. And nobody working on Mino was a lawyer,</p> <p>04:34:56 19 correct?</p> <p>04:34:57 20 A. I believe that's correct.</p> <p>04:34:57 21 Q. And Mino didn't have an in-house lawyer,</p> <p>04:35:00 22 right?</p> <p>04:35:02 23 A. I don't think that Xio employed a lawyer</p> <p>04:35:04 24 in-house.</p> <p>04:35:05 25 Q. And Xio did not obtain an opinion letter from</p>

<p style="text-align: center;">185</p> <p>04:35:08 1 a lawyer saying that it could release Mino without</p> <p>04:35:11 2 violating the copyrights of my client's works; isn't</p> <p>04:35:16 3 that true?</p> <p>04:35:17 4 A. I don't recall an opinion letter.</p> <p>04:35:19 5 Q. So now, let's keep looking at this document</p> <p>04:35:22 6 under where it says "Copyright." Do you see that?</p> <p>04:35:26 7 A. Yes.</p> <p>04:35:26 8 Q. And this is you writing, "Copyright." You</p> <p>04:35:29 9 wrote, "The Tetris Company has no relevant copyright</p> <p>04:35:33 10 protection that would prevent us from producing and</p> <p>04:35:36 11 selling Mino." Do you see that?</p> <p>04:35:37 12 A. I see that.</p> <p>04:35:39 13 Q. And that was in your opinion; is that right?</p> <p>04:35:41 14 A. That's correct.</p> <p>04:35:42 15 Q. Okay. Were you aware of the decision of the</p> <p>04:35:50 16 Customs office with regard to the protectability of the</p> <p>04:35:58 17 Tetris Company's works?</p> <p>04:36:00 18 MS. MAITRA: And just to be clear, you're</p> <p>04:36:01 19 asking whether Xio or whether --</p> <p>04:36:04 20 MS. CENDALI: Q. I'm asking whether Xio,</p> <p>04:36:06 21 prior to launching Mino, was aware of the decision of</p> <p>04:36:12 22 the Customs Department, in particular Judge Stump, with</p> <p>04:36:19 23 regard to the protectability of the Tetris Company's</p> <p>04:36:25 24 copyrights.</p> <p>04:36:27 25 A. At the time we looked at a whole range of</p>	<p style="text-align: center;">187</p> <p>04:37:59 1 possible, and, you know, I do remember that the memo</p> <p>04:38:04 2 wasn't used in our legal analysis. I personally -- you</p> <p>04:38:09 3 know, I wrote this legal analysis on behalf of Xio</p> <p>04:38:12 4 Interactive, and at the time I don't remember seeing</p> <p>04:38:16 5 that memo.</p> <p>04:38:18 6 Q. Isn't it true that Xio had in its possession</p> <p>04:38:27 7 Exhibit 18, this copy of the Customs Department</p> <p>04:38:36 8 decision?</p> <p>04:38:36 9 (Whereupon, Deposition Exhibit 18 was</p> <p>04:38:36 10 marked for identification.)</p> <p>04:38:43 11 THE WITNESS: So it does look like, according</p> <p>04:38:44 12 to this document, that Desiree had a copy of this</p> <p>04:38:47 13 Customs decision.</p> <p>04:38:48 14 MS. CENDALI: Q. Right. And so Xio had a</p> <p>04:38:51 15 copy of the Customs House decision; isn't that true?</p> <p>04:38:54 16 A. Yes, I think what I said was that Desiree</p> <p>04:38:57 17 Golen, on her desktop, had a copy of this Customs</p> <p>04:39:02 18 letter.</p> <p>04:39:03 19 Q. And isn't it true that Desiree Golen, CEO of</p> <p>04:39:07 20 Xio, was discussing this decision with other developers</p> <p>04:39:13 21 of Tetris-like games?</p> <p>04:39:21 22 MS. MAITRA: Objection; vague.</p> <p>04:39:22 23 THE WITNESS: You know, I'm not sure what you</p> <p>04:39:24 24 mean by that. I'm not sure which other developers</p> <p>04:39:28 25 you're talking about and which other games you're</p>
<p style="text-align: center;">186</p> <p>04:36:29 1 legal decisions and articles, and, you know, I remember</p> <p>04:36:32 2 reading a lot of different documents, and I don't</p> <p>04:36:34 3 remember being intimately familiar with that at the</p> <p>04:36:37 4 time. I do remember that it may have come up, and I</p> <p>04:36:42 5 glanced through it. I think I've since become more</p> <p>04:36:45 6 familiar with that since this lawsuit, but --</p> <p>04:36:48 7 Q. Are you --</p> <p>04:36:48 8 MS. MAITRA: So you're talking on behalf of</p> <p>04:36:50 9 Xio now, not just you, Michael Carter. Okay?</p> <p>04:36:53 10 THE WITNESS: So Xio Interactive may have been</p> <p>04:36:56 11 peripherally aware of that decision.</p> <p>04:36:59 12 MS. CENDALI: Q. Isn't it true that Xio</p> <p>04:37:00 13 Interactive -- isn't it true that Xio Interactive's CEO,</p> <p>04:37:10 14 Desiree Golen, had your sister do a memo about</p> <p>04:37:19 15 copyrightability of computer games?</p> <p>04:37:22 16 A. You know, I don't know that she had her do a</p> <p>04:37:25 17 memo necessarily. I think that she had asked her to</p> <p>04:37:27 18 look into IP law as it relates to video games and as it</p> <p>04:37:34 19 might apply to Xio Interactive.</p> <p>04:37:36 20 Q. And isn't it true that your sister wrote a</p> <p>04:37:40 21 memo that was provided to Xio Interactive that, among</p> <p>04:37:45 22 other things, discussed the Customs House -- the</p> <p>04:37:50 23 Customs Department decision?</p> <p>04:37:52 24 A. I believe that she wrote a memo, and I'd have</p> <p>04:37:55 25 to see the memo again to confirm that, but it's</p>	<p style="text-align: center;">188</p> <p>04:39:31 1 talking about.</p> <p>04:39:32 2 MS. CENDALI: Q. Are you aware that she was</p> <p>04:39:33 3 discussing this decision with Todd Bilborrow?</p> <p>04:39:43 4 A. I'm aware that she had discussions with Todd</p> <p>04:39:46 5 about his situation.</p> <p>04:39:48 6 Q. And isn't it true that you were also aware</p> <p>04:39:54 7 that -- and discussed with Ms. Golen whether she should</p> <p>04:39:58 8 write to Mr. Cormier, the lawyer who represented the</p> <p>04:40:02 9 entities opposite the Tetris Company in this decision</p> <p>04:40:07 10 of the Customs Department?</p> <p>04:40:12 11 A. I don't know that that's true. I think when</p> <p>04:40:15 12 you -- when you mention it, I think that Desiree may</p> <p>04:40:21 13 have been considering writing to Mr. Cormier, and, you</p> <p>04:40:24 14 know, I don't know exactly why. I don't think I was a</p> <p>04:40:29 15 big part of that decision. I think she may have at the</p> <p>04:40:33 16 time -- you know, she could have mentioned the different</p> <p>04:40:35 17 things she was working on and talking about and said</p> <p>04:40:38 18 that she was going to contact this person, I don't know.</p> <p>04:40:41 19 Q. So you wrote in your memo that, "The Tetris</p> <p>04:40:44 20 Company has no relevant copyright protection that would</p> <p>04:40:49 21 prevent us from producing and selling Mino," right?</p> <p>04:40:52 22 A. That is correct.</p> <p>04:40:53 23 Q. And you wrote that despite the fact that Xio</p> <p>04:40:56 24 knew that there was a Customs Department decision that</p> <p>04:41:02 25 discussed at length the protectable, copyrightable</p>

EXHIBIT B

Custodian: Desiree Golen

Case 3:09-cv-06115-FLW-DEA Document 38-2 Filed 05/11/11 Page 9 of 20 PageID: 482

Filename: mino_screenshot.png

Filetype: image/png

XIO INTERACTIVE INC



Mino

Category: Games
Released May 09, 2009
Seller: Michael Carter
© 2009 XIO INTERACTIVE
Version: 1.0
4.2 MB

\$2.99

BUY APP

Rated 4+



APPLICATION DESCRIPTION

XIO INTERACTIVE proudly presents MINO!

****Opening Sale:** Be one of our first 1,000 users and get MINO for only \$2.99!**

This Tetromino game has the fast-paced, line-clearing features of individual gameplay, plus an innovative NETWORK game mode that pits players against each other in real-time competition.

Experiment with input options and see what you like best: TAP, TWO-FINGER TAP, FLICK-UP, FLICK-DOWN and DRAG.
Train your way to a top score!
Jam to our all-new, original music tracks!

Single Player Game Modes:

STANDARD MODE– Keep up the pace as each Tetromino piece drops with increasing speed! Rest assured you can use your SLOW button to calm things down.

GLACIER MODE– Battle against the clock as garbage lines flood your board and test your MINO agility! Only the best can survive the onslaught! Hit the FREEZE button when you need a break.

Multi-Player Game Features:

Want to See How Good You Really Are?
For the first time on the mobile platform, engage other users in head-to-head Tetromino competition! Send lines of garbage to your opponent while clearing your own board! Hit STEALTH to hide your board and block the receipt of garbage. Rack up points to climb up the global HIGH SCORES chart!

Feeling Social?
JOIN A ROOM to play up to four other players and chat with thousands of other MINO fans. Want to see how the pros do it? Sit back and hit WATCH to view current games in progress.

****Update your iPhone and iPod touch to Version 2.2 before downloading MINO****

MINO IS NOT AFFILIATED WITH TETRIS® OR THE TETRIS COMPANY

LANGUAGES:
English

REQUIREMENTS:
Compatible with iPhone and iPod touch
Requires iPhone 2.2 Software Update

XIO INTERACTIVE INC Web Site

Mino Support

CUSTOMER RATINGS



CUSTOMERS ALSO BOUGHT

See All

PUNK JUSTICE

Games

GemDrop Deluxe

Games

World of Tunes

Games

Caster

Games

EXHIBIT C

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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October 28, 2010

Via Facsimile 609-989-0451

Hon. Douglas E. Arpert, U.S.M.J.
United States District Court
Clarkson S. Fisher Federal Bldg.
& U.S. Courthouse
402 E. State Street
Trenton, New Jersey 08608

Re: *Tetris Holding, LLC, et al. v. Xio Interactive, Inc.*
Civil Action No. 09-6115 (FLW)(DEA)
Status Conference: October 29, 2010

Dear Judge Arpert:

We are counsel for plaintiffs and counterclaim-defendants Tetris Holding, LLC and The Tetris Company, LLC (collectively, "The Tetris Company") in the above-referenced matter.

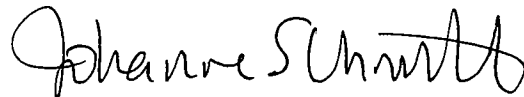
We write to respond briefly to an issue raised by Sonali Maitra, Esq., counsel for defendant and counter-claimant Xio Interactive, Inc. ("Xio"), in her letter to Your Honor, dated October 27, 2010. Specifically, Xio seeks immunity from compliance with its discovery obligations on the basis that it is a small company with few resources to pay attorney fees. In reality, however, Xio has disclosed in discovery that it has a fee arrangement with its law firm—Durie Tangri—that only requires Xio to pay a small percentage of its revenues each month. In other words, Xio's fees do not increase if its attorneys have to spend additional time to cure prior discovery deficiencies. Moreover, Durie Tangri is far from an inexperienced firm unfamiliar with modern discovery rules. It is a reputable San Francisco-based intellectual property boutique that spun off from Kecker & Van Nest LLP and has a national litigation practice. Thus, there is no excuse for Xio and its lawyers not complying with the rules of discovery, delaying discovery, and unnecessarily burdening The Tetris Company with repeated substandard discovery practices and delaying tactics.

KIRKLAND & ELLIS LLP

Hon. Douglas E. Arpert
October 28, 2010
Page 2

We thank Your Honor for consideration of this application.

Sincerely,

A handwritten signature in black ink, appearing to read "Johanna Schmitt". The signature is fluid and cursive, with the first name "Johanna" written in a larger, more prominent script than the last name "Schmitt".

Johanna Schmitt

JS /jpc

cc: Sonali Maitra, Esq.
Joseph Gratz, Esq.
Donald Robinson, Esq.
Robert J. Schoenberg, Esq.
(All via electronic mail)

EXHIBIT D

Securities Register

Name and Address of Shareholder	Date of Issue or Transfer	If by Transfer, From Whom?	Number and Kind of Shares	Certificate Number	Price per Share	Number of Shares Allotted for Cash	Number of Shares Allotted for Other Considerations	Particulars of Contract	Rate of Commission or Discount Paid or Agreed
Desiree Golem	3/05/09		4100 COMMON	COM002			4100		143 82 6710
Michael Carter	3/05/09		4100 COMMON	COM003			4100		564 83 1176
Kathryn Flynn	1/12/10		500 COMMON	COM004	\$10.00	500			
Martin Hunt	1/12/10		900 COMMON	COM005			900	Technical Services	254 73 4299
Mario Balibrera	1/12/10		400 COMMON	COM006			400	Technical Services	606 30 7213
Michael Carter	1/25/10		80 COMMON		\$25.00		80		564831176
Kathryn Flynn	12/15/2010		140 COMMON	COM008	\$25.00		140		
Michael Carter	12/15/2010		208 COMMON	COM009	\$25.00		208		564831176
Martin Hunt	12/15/2010			COM010	\$25.00		180		254734299
Total							10,608		

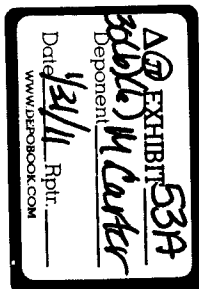


EXHIBIT E

Custodian: Desiree Golen

Case 3:09-cv-06115-FLW-DEA Document 38-2 Filed 05/11/11 Page 17 of 20 PageID: 490

Filename: Users/xio/Desktop/tetranet/build/mino.build/mino.pbxindex/sym

Filetype: Unknown

November 5, 2009

VIA E-MAIL

Desiree Golen, CEO
Xio Interactive, Inc.

Re: Legal Services Agreement

Dear Desiree:

This letter will set forth our Agreement concerning Durie Tangri LLP's representation of Xio Interactive, Inc. The purpose of this document is to set forth our mutual understandings concerning the terms of retention.

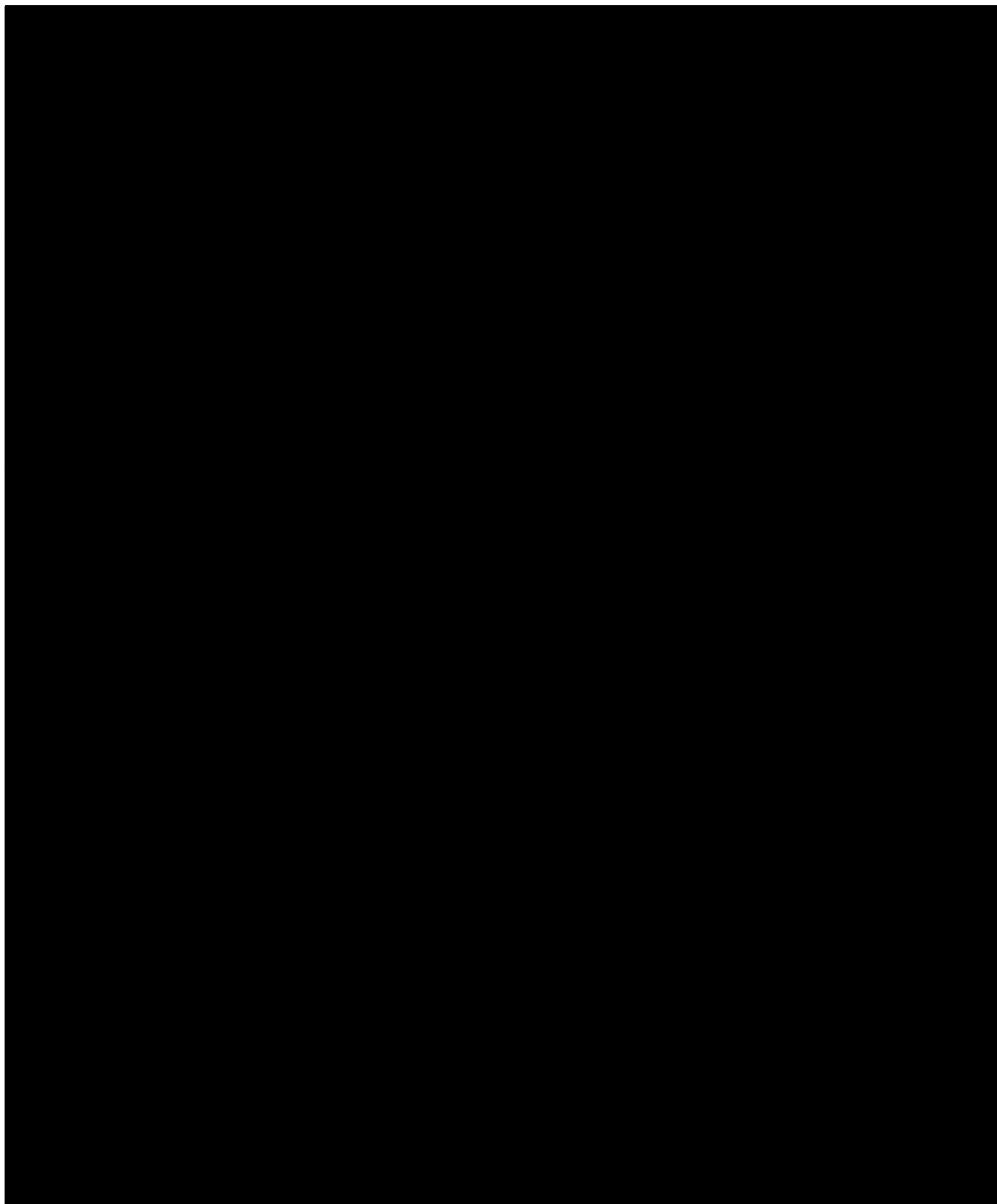
[REDACTED]

4.

[REDACTED]

However, the parties understand that Xio will pay no more than 10% of its monthly revenue in legal fees.


[REDACTED]



Very truly yours,

Mark A. Lemley

AGREED AND ACCEPTED:


Desiree Golen
Xio Interactive

Dated: 11/16/09